



# Committee on Transportation and Infrastructure Democrats

Rep. Peter DeFazio – Ranking Member

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January 9, 2015

## **BACKGROUND MEMORANDUM**

**TO:** Interested Parties  
**FROM:** Democratic Staff, Committee on Transportation and Infrastructure  
**RE:** H.R. 3, “Keystone XL Pipeline Act”

### **H.R. 3, KEYSTONE XL PIPELINE ACT- QUICK FACTS**

This is the tenth time the House has considered legislation to approve construction of the Keystone XL pipeline.

Like previous bills, H.R. 3:

- Deems approved the 2012 application of TransCanada to construct, connect, operate, and maintain the Keystone XL pipeline and related cross-border facilities, thereby circumventing the President’s authority to approve the cross-border pipeline;
- Deems the January 2014 Final SEIS issued by the Secretary of State as fully satisfying all laws and environmental regulations, including the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, and other environmental requirements, disregarding the more than 2.5 million comments filed following publication of the Final Supplemental Environmental Impact Statement (SEIS0, which the Department is currently reviewing.
- Gives the D.C. Circuit Court of Appeals exclusive jurisdiction to determine the validity of any legal challenge to a Federal agency action regarding the pipeline; and
- Clarifies that nothing in the Act alters any Federal, State, or local process or condition in effect on the date of enactment of the Act that is necessary to secure access from an owner of private property to construct the pipeline, upholding the Nebraska State law, essentially promoting the use of eminent domain.

### **General Background**

The proposed Keystone XL pipeline is a 1,959-mile, 36-inch-diameter pipeline that would transport up to 830,000 barrels per day of tar sands (heavy) crude oil from Alberta,

Canada and the Bakken Shale Formation in the United States to refineries in the Gulf Coast. One phase of the project is in operation (300 miles); a second, from Oklahoma to the Texas Gulf Coast, is under construction (480 miles); and the third, a 1,179-mile pipeline from Alberta, Canada to Steele City, Nebraska, is awaiting U.S. government approval.

#### **KEYSTONE XL PIPELINE PERMIT PROCESS**

TransCanada Keystone Pipeline, LP applied for a Presidential Permit to authorize the construction of a proposed pipeline crossing the United States-Canadian border. For proposed petroleum pipelines that cross international borders of the United States, the President, through Executive Orders 11423 and 13337, directs the Secretary of State to decide whether a cross-border project is in the national interest. Prior to making the national interest determination, the National Environmental Policy Act (NEPA) requires the U.S. Department of State (Department) to prepare an environmental impact statement (EIS), which assesses impacts on the environment that would result from a project and evaluates alternatives that would avoid or minimize adverse environmental effects.

On December 23, 2011, Congress passed the Temporary Payroll Tax Cut Continuation Act of 2011, which required the President to determine within 60 days whether the Keystone XL pipeline is in the national interest. On January 18, 2012, the Department recommended that the permit for the proposed pipeline be denied because it did not have sufficient time to obtain the information necessary to assess whether the project is in the national interest. At that time, there was no identified route through Nebraska. Based on the Department's recommendation, the President denied the application, stating that "the rushed and arbitrary deadline insisted on by Congressional Republicans prevented a full assessment of the pipeline's impact, especially the health and safety of the American people, as well as our environment."

In February 2012, TransCanada split the project into two pieces: a northern route, extending 1,179 miles from Alberta, Canada to Steele City, Nebraska, and a southern route, extending from Cushing, Oklahoma to Nederland, Texas (called the Gulf Coast Project). Since the southern route did not require a Presidential Permit, TransCanada began construction on the project.

On April 17, 2012, the Nebraska State Legislature passed a pipeline siting law which authorized the Governor, rather than the State's Public Service Commission, to approve or reject TransCanada's proposed Nebraska route for the Keystone XL pipeline. The law also reaffirmed TransCanada's authority to seize private property for construction of the pipeline.

On April 18, 2012, TransCanada submitted a proposed alternative route to the Nebraska Department of Environmental Quality, and on May 4, 2012, TransCanada reapplied for a Presidential Permit for the revised route, which is now known as "the northern route". The main difference between the new application and the old application is the newly proposed route would avoid Nebraska's Sand Hills region, a region of grass-covered sand dunes that overlies the critically important Ogallala aquifer. However, the pipeline would still pass through areas above the Ogallala, where the water supply is vulnerable to the impacts of an oil spill.

On January 3, 2013, the Nebraska Department of Environmental Quality submitted its Final Evaluation Report on the proposed northern route, which was self-funded by TransCanada, to the Nebraska Governor for review.

On January 22, 2013, the Governor of Nebraska notified the Department that he had approved the proposed route, and on February 5, 2014, the Department published its Final Supplemental Environmental Impact Statement (SEIS) for the permit application in the *Federal Register*. More than **2.5 million** comments were received on the Final SEIS; the Department is currently reviewing them.

On April 18, 2014, The Department notified Federal agencies that it will provide more time for the submission of views on the pipeline because of the uncertainty created by on-going litigation over the route in Nebraska.

#### **NEBRASKA SUPREME COURT CASE**

In May 2012, three Nebraska landowners filed suit against the Nebraska Governor, the state treasurer, and the director of the Department of Environmental Quality, claiming their approval of the pipeline violates the state Constitution. Specifically, the landowners argued:

- The Nebraska state law (LB 1161) unconstitutionally delegates authority of a common carrier to the Nebraska Department of Environmental Quality when common carriers are assigned already by Nebraska's constitution to the Public Service Commission.
- LB 1161 violates separation of powers because it fails to provide for judicial review.
- LB 1161 violates separation of powers because it unlawfully delegates to the governor the decision to permit the exercise of eminent domain without adequate and definite standards required to meet constitutional requirements for due process.
- LB 1161 constitutes special legislation for a single company and not persons in general which violates the Nebraska state constitution.

On February 19, 2014, the District Court of Lancaster County in Nebraska ruled that the Governor's actions on the pipeline approval were "unconstitutional and void". The decision invalidated the pipeline's path; state officials immediately appealed the case to the Nebraska Supreme Court.

On September 6, 2014, the Nebraska Supreme Court heard oral arguments. On January 9<sup>th</sup>, 2015 a majority of the Nebraska Supreme Court, four of the seven justices, agreed that the law was unconstitutional. However, under Nebraska's Constitution, the Court needs a supermajority to address a constitutional challenge to a statute. Although the Court vacated the lower court decision on the technical issue of standing, the Court stated directly in its opinion: "No member of this court opines that the law is constitutional."